

Stephen J. Shoemaker, Ph.D.

Professor of Religious Studies and Ira E. Gaston Fellow in Christian Studies

University of Oregon

Expert Witness Report for the Minnesota Department
of Education

for

Loe, et al. v. Minnesota Department of Education, et al.

Case No. 23-cv-1527 (U.S. Dist. Ct., Dist. of Minn.)

I. Educational and Professional Qualifications

I received a Ph.D. in the History of Christianity from Duke University in 1997. Since then I have taught briefly at the University of Florida and Florida State University, before coming to the University of Oregon in 2000, to take a position with responsibility for covering the History of Christianity. I have been awarded many of the most prestigious fellowships awarded to scholars of the humanities, including the John Simon Guggenheim Memorial Foundation, the American Council of Learned Societies, the Institute for Advanced Study, the National Humanities Center, the Radcliffe Institute for Advanced Study at Harvard University, the Rockefeller Foundation, the Alexander von Humboldt Foundation, the Deutsche Forschungsgemeinde, and the National Endowment for the Humanities. At present I am Professor and Ira E. Gaston Fellow in Christian Studies in the department of Religious Studies at the University of Oregon. Below is a list of my publications from the last ten years.

Books

- Shoemaker, Stephen J. *The Dormition and Assumption of the Virgin Mary*. Turnhout: Brepols, 2023. (Translations from Ethiopic, Syriac, Christian Palestinian Aramaic, Greek, Latin, and Georgian.)
- _____. *Creating the Qur'an: A Historical-Critical Study*. Oakland: University of California Press, 2022. (Open Access)
- _____. *A Prophet Has Appeared: The Rise of Islam through Christian and Jewish Eyes*. Oakland: University of California Press, 2021.
- Turkish trans. in progress.
- _____. *The Apocalypse of Empire: Imperial Eschatology in Late Antiquity and Early Islam*. Philadelphia: University of Pennsylvania Press, 2018. viii + 252 pp.
- _____. *The First Christian Hymnal: The Songs of the Ancient Jerusalem Church* (Georgian text with translation). Provo: BYU Press, 2018 (Eastern Christian Texts Series). xxxvii + 338 pp.
- _____. *The Dormition and Assumption Apocrypha*. Studies on Early Christian Apocrypha. Leuven: Peeters Publishers, 2018. xii + 368 pp.
- _____. *Three Christian Martyrdoms from Early Islamic Palestine: The Passion of Peter of Capitolias (d. 715), the Passion of Romanos (d. 780), and the Twenty Martyrs of Mar Saba (d. 797)* (Georgian and Greek texts with translation). Provo: BYU Press, 2016 (Eastern Christian Texts Series). xlv + 209 pp.
- _____. *Mary in Early Christian Faith and Devotion*. New Haven: Yale University Press, 2016. 289 pp.
- Romanian trans. *Fecioara Maria în credința și evlavie creștină primară*. Iași: Doxologia, 2018.

Co-Authored Books

Shoemaker, Stephen J. and Sean W. Anthony (Ohio State University). *The Capture of Jerusalem by the Persians in 614*. Chicago: The Oriental Institute, University of Chicago, forthcoming. (parallel critical translations of the Georgian and Arabic versions.) Currently in press.

Monographic Articles (Peer-Reviewed)

Shoemaker, Stephen J. "In Search of 'Urwa's *Sīra*: Some Methodological Issues in the Quest for 'Authenticity' in the Life of Muḥammad." *Der Islam* 85.2 (2009): 257-344.

Peer-Reviewed Articles

Shoemaker, Stephen J. "Mahomet dans l'histoire." In *Le Mahomet des historiens*, edited by Mohammad Ali Amir-Moezzi and John Tolan. Paris: Les éditions du Cerf, 2025.

_____. "The *Passion of St Golinduch* (d. 591)." In *Eustratius Presbyter: Hagiographies*, edited by Averil Cameron and Philip Booth, forthcoming. Translated Texts for Historians. Liverpool: Liverpool University Press, 2024.

_____. "The Dome of the Rock and Early Islamic Eschatology." In *Marking the Sacred: The Temple Mount / Haram al-Sharif in Jerusalem*, edited by Joan Branham and Beatrice St. Laurent, forthcoming. University Park, PA: Penn State University Press, 2019. Final version submitted 31 July 2017.

_____. "Constantine and the Birth of Medieval Apocalypticism: Imperial Eschatology in Eusebius, Lactantius, Ephrem, Aphrahat, and the *Tiburtine Sybil*." In *Apocalyptic Cultures in Medieval and Renaissance Europe: Politics and Prophecy*, edited by Jay Rubenstein and Robert Bast, 25-46. Turnhout: Brepols, 2024.

_____. (with John C. Lamoreaux and Jean-Daniel Kaestli). "An Early Dormition Narrative in Karshuni: An Edition and Translation of the 'Six Books' Apocryphon from the Karshuni Codex 199 of St Mark's in Jerusalem (Apograph of Damascus Patr. 12/17 & 12/18)." *Apocrypha: International Journal of Apocryphal Literatures* 33 (2022): 13-90.

_____. "Mary at Mar Saba: The Late Ancient Origins of the Orthodox *Life of the Virgin* Tradition." *Journal of Orthodox Christian Studies* 5 (2022): 153-77.

_____. "Qur'an and Context." *Oxford Bibliographies Online* (Oxford: Oxford University Press) <https://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0280.xml>.

_____. "Les vies de Muhammad." In *Le Coran des historiens*, edited by Mohammad Ali Amir-Moezzi and Guillaume Dye, vol. 1, 183-245. 2 vols. Paris: Les éditions du Cerf, 2019.

_____. "The Coptic *Homily on the Theotokos* attributed to Cyril of Jerusalem: An Aberrant and Apologetic 'Life' of the Virgin from Late Antiquity." In *The Reception of the Mother of God: Marian Narratives in Texts and Images*, edited

by Thomas Arentzen and Mary Cunningham, 217-34. Cambridge University Press, 2019.

_____. "Apocrypha." In *Oxford Handbook on Early Christian Biblical Interpretation*, edited by Paul M. Blowers and Peter W. Martens, 285-294. Oxford: Oxford University Press, 2019.

_____. "Anastasius of Sinai and the Beginnings of Islam." In *Journal of Orthodox Christian Studies* 1.2 (2018): 137-54.

_____. "Muhammad," in *The Routledge Handbook on Early Islam*. Ed. Herbert Berg, 49-64. New York: Routledge, 2018.

_____. "Sing, O Daughter(s) of Zion: Public Worship in the Melanias' Jerusalem." *Melania: Early Christianity in the Life of One Family*, edited by Catherine M. Chin and Caroline T. Schroeder, 222-39. Berkeley: University of California Press, 2016.

_____. "The Afterlife of the Apocalypse of John in Byzantine Apocalyptic Literature and Commentary." *The New Testament in Byzantium*, edited by Derek Krueger and Robert S. Nelson, 301-16. Washington, DC: Dumbarton Oaks, 2016.

_____. "The (Ps?-)Maximus *Life of the Virgin* and the Marian Literature of Middle Byzantium." *Journal of Theological Studies* 67.1 (2016): 115-42.

_____. "The *Apocalypse of the Virgin*: A New Translation and Introduction." To appear in *More Christian Apocrypha*, edited by Tony Burke and Brent Landau, 488-505. Grand Rapids, Mich.: Eerdmans, 2016.

_____. "The *Tiburtine Sibyl*: A New Translation and Introduction." To appear in *More Christian Apocrypha*, edited by Tony Burke and Brent Landau, 506-521. Grand Rapids, Mich.: Eerdmans, 2016.

_____. "The *Tiburtine Sibyl*, the Last Emperor, and the Early Byzantine Apocalyptic Tradition." *Forbidden Texts on the Western Frontier: The Christian Apocrypha in North American Perspectives*, edited by Tony Burke, 218-44. Eugene, OR: Cascade Books, 2015.

_____. "The Reign of God Has Come: Eschatology and Empire in Late Antiquity and Early Islam." *Arabica: Journal of Arabic and Islamic Studies* 61 (2014): 514-58.

_____. "Apocalyptic Traditions in the Armenian Dormition Narratives." In *The Armenian Apocalyptic Tradition: A Comparative Perspective*, edited by Kevork D. Bardakjian and Sergio LaPorta, 538-50. Leiden: Brill, 2014.

Invited Articles

Shoemaker, Stephen J. "The Georgian Version of the *Infancy Gospel of Thomas*. Text and Translation. In *The Infancy Gospel of Thomas*. Ed. David Cielontko, Tobias Nicklas, and Jan Bremmer. Leuven: Peeters, 2024. Submitted Feb 2024.

_____. "Early Palestinian Passion Piety and the Monastic Origins of Marian Lament at Mar Saba." In *Discipline, Authority, and Texts in Late Antique Religion: Essays in Honor of David Brakke*. Ed. Ellen Muehlberger and Bradley Storin. Turnhout: Brepols, 2024. Submitted August 2023.

_____. "Early Islamic Imperialism and Colonialism: Some Preliminary Thoughts with Reference to Palestine. In *Late Antique Palaestina on the Map of Migration*

and Mobility. Ed. Maren Niehoff. Tübingen: Mohr Siebeck, 2024. Submitted September 2023.

_____. "Mary." In *Brill Encyclopedia of Early Christianity*. Ed. David G. Hunter, Paul J.J. van Geest, Bert Jan Lietaert Peerbolte. Submitted 27 June 2023.

_____. "The Imperial Qur'an: Scripture in the Service of Empire." In *Mélanges d'études shi'ites et islamologiques offertes au Professeur Mohammad Ali Amir-Moezzi*, edited by Mathieu Terrier and Orkhan Mir-Kasimov. Turnhout: Brepols. Submitted 8 November 2022.

_____. "Mary between Bible and Qur'an: Apocrypha, Archaeology, and the Memory of Mary in Late Ancient Palestine." To appear in *Extracanonical Traditions and The Holy Land: Texts, Rituals, and Material Culture in Late Antique Palestine*, Harald Buchinger, Andreas Merkt, and Tobias Nicklas, editors. Submitted 15 February 2020.

_____. "Hagiography at the Monastery of Mar Saba in the Early Middle Ages." To appear in *The Lavra of St. Sabas: Liturgy and Literature in Communities and Contexts*, Joseph Verheyden and Daniel Galadza, editors. Submitted 6 January 2020.

_____. "The Cult of the Virgin in the Liturgy of Late Ancient Constantinople." *Towards the Prehistory of the Byzantine Liturgical Year: Festal Homilies and Festal Liturgies in Late Antique Constantinople*, edited by Stefanos Alexopoulos and Harald Buchinger. Leuven: Peeters, forthcoming. Final version submitted 12 June 2019.

_____. "Passion Piety and Anti-Judaism in Late Ancient Jerusalem: Hymns for Holy Week from the *Jerusalem Georgian Chantbook*." In *The Byzantine Liturgy and the Jews*, edited by Harald Buchinger and Alexandru Ioniță, forthcoming. Münster: Aschendorff. Final Version submitted May 2019.

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_____. "Syriac Apocalypticism and the Rise of Islam." In *The Third Lung: New Trajectories in Syriac Studies*, edited by Bruria Bitton-Ashkelony, Miriam J. Hjälm and Robert A. Kitchen, 325-38. Leiden: Brill, 2023

_____. "The Jerusalem Temple and the Qur'an's Holy House." In *Abschied von der Heilsgeschichte*, edited by Robert M. Kerr and Marcus Groß, 179-200. Die Entstehung einer Weltreligion Band 7. Berlin: Schiler-Mücke, 2023.

_____. "Method and Theory in the Study of Islamic Origins." In *Early Islam: The Sectarian Milieu of Late Antiquity?*, edited by Guillaume Dye, 15-30. Brussels: University of Brussels, 2023.

_____. "A New Arabic Apocryphon from Late Antiquity: The Qur'an." In *The Study of Islamic Origins: New Perspectives and Contexts*, edited by Mette Bjerregaard Mortensen, Guillaume Dye, Isaac Oliver and Tommaso Tesei, 29-42. Berlin: Walter de Gruyter, 2021.

_____. "Qur'anic Eschatology in its Biblical and Late Ancient Matrix." In *Dreams, Visions, Imaginations: Jewish, Christian and Gnostic Views of the World to*

Come, edited by Schröter Jens, Nicklas Tobias and Armand Puig i Tàrrach, 461-86. Berlin: De Gruyter, 2021.

_____. “The Eschatological Reign of God in the Qur’an: The *Amr Allāh*” In *Die Entstehung einer Weltreligion VI: Vom umayyadischen Christentum zum abbasidischen Islam*, Robert Kerr and Markus Groß, editors, 720-33. Berlin: Schiler-Mücke, 2020.

_____. “Ps.-Ps.-Dionysius on the Dormition: A Translation and Study of the Armenian Letter from Dionysius to Titus.” In *The Jewish Roots of Eastern Christian Mysticism: Studies in Honor of Alexander Golitzin*, edited by Andrei Orlov, 325-36. Leiden: Brill, 2020.

_____. “The Portents of the Hour: Eschatology and Empire in the Early Islamic Tradition.” In *Cultures of Eschatology: Authority and Empire in Christian, Muslim, and Buddhist Communities*, edited by Veronika Wieser, Vincent Eltschinger and Johann Heiss, 298-320. Berlin: de Gruyter, 2020.

_____. “Dormition and Assumption Apocrypha.” In *Brill Encyclopedia of Early Christianity*, 2018. Ed. David G. Hunter, Paul J.J. van Geest, Bert Jan Lietaert Peerbolte. http://dx.doi.org/10.1163/2589-993_eeco_SIM_036373.

_____. “Jewish Christianity, Non-Trinitarianism, and the Beginnings of Islam.” In *Jewish Christianity and Early Islam*, edited by Francisco del Río Sánchez, 101-14. Turnhout: Brepols, 2017.

_____. “Commentaries on Qur’ān 18.60-102, 19.1-98, 74.1-56, 88.1-26.” In *The Qur’ān Seminar*, edited by Mehdi Azaiez. <http://www.iqsa-quranseminar.org/>. Also“ Berlin: Walter de Gruyter, 2016.

_____. “Mary in Early Christian Apocrypha: Virgin Territory.” In *Rediscovering the Apocryphal Continent*, edited by Pierluigi Piovanelli and Tony Burke, 175-90. Tübingen: Mohr Siebeck 2015.

_____. “The Ancient Dormition Apocrypha and the Origins of Marian Piety: Early Evidence of Marian Intercession from Late Ancient Palestine.” In *Presbeia Theotokou, The Intercessory Role of Mary across Times and Places in Byzantium (4th – 9th century)*, edited by Leena Mari Peltomaa, Pauline Allen and Andreas Külzer, 23-39. Vienna: Austrian Academy of Sciences 2015.

II. Compensation

I am being compensated at a rate of \$300 per hour for the preparation of this expert opinion.

III. Prior Testimony

I have not testified as an expert at trial or by deposition in any case during the last four years.

IV. Basis for Opinion and Materials Considered

My opinion is based on my review of the materials relevant to the case *Loe, et al. v. Minnesota Department of Education, et al.* that were provided to me by the Office of the Minnesota Attorney General. Beyond these, I rely primarily on my expertise as a historian of Christianity in the official employ of the State of Oregon, expertise developed over thirty years of study, research, and teaching across the range of the Christian tradition. I also based my opinion of the most current scholarly literature regarding faith confessions and their role in religious institutions of higher education, as well as reading a number of such faith statements from different institutions – including the mandatory statements imposed by both Crown and Northwestern specifically. The most important and influential sources consulted are indicated in the notes to my statement. I was asked by the Attorney General’s Office to respond to six different topics deemed relevant to this case. These are indicated in my statement and are responded to individually and specifically.

V. Statement of Opinion

1. What is the historical purpose and significance of faith statements, creeds, or oaths like those that Crown and Northwestern require, particularly in the Christian tradition?

Creeds and faith statements have a long history in the Christian tradition, reaching back into its very earliest history. While the importance of such confessions is not unique to Christianity among other religious traditions, they play a far more central role in it than in many other faith traditions. In the academic study of religion, it is common to differentiate among religions – along a sliding scale – between the categories of “orthodoxy” and “orthopraxy.” The terms refer to the primary orientations around which various communities define their identities and boundaries. In an “orthopraxic” tradition, the difference between various religious communities, both internally and externally, are generally marked by matters of religious practice, rather than belief. Prominent examples of religious traditions that lean strongly toward the “orthopraxic” end of the spectrum include both Judaism and Islam, for instance. Adherence to Judaism and Islam is defined primarily by the observance of a prescribed set of practices, and the different communities existing within these faith traditions are also differentiated primarily by variance in practice, rather than the belief in certain ideas or not. Nevertheless, in “orthodoxic” traditions – of which Christianity is a prime example – such limits are regularly

drawn instead around matters of belief or confession: adherence to and profession of a particular set of ideas, in other words.

Scholars of the New Testament have identified several passages in the Pauline epistles that seem to be early creeds already from as early as the middle of the first century (e.g., 1 Corinthians 15:3-10, Philippians 2:6-11, 1 Timothy 2:5-11). Nevertheless, in its earliest history the Christian tradition was highly fragmented along lines of belief, owing to its predominantly orthodox nature. Christians were divided into different groups over an astonishing range of beliefs. For instance, how many gods were there? One? Two? Three-hundred and sixty-five? Was the Creator and the creation good or evil? How was Jesus of Nazareth related to the divine realm? Was he actually some sort of “divine” being that had become a human being or did he only appear to be in the flesh? Did he provide his followers with salvation somehow through his incarnation, death, and resurrection, or was he instead primarily a divine messenger who brought secret knowledge from the heavenly realm, understanding of which held the key to salvation? In its earliest history, Christianity was a complicated and diverse mishmash of competing beliefs, with numerous Christian groups divided among one another by a wide range of competing and contradictory ideas about just how their professed Savior, Jesus Christ, would save them.

The fourth century was a pivotal era for both Christianity as a whole and for the increasing prominence of faith statements within it. In the early fourth century, the Roman Emperor Constantine began an engagement with the Christian faith that would conclude with his formal conversion to Christianity and baptism only on his deathbed (337). It was then during the middle of the fourth century that the Christian faith gradually became fused with the Roman Empire and its authority, a synthesis that required Christianity to come to a greater confessional unity than had been evidence during the first three centuries of its history. Already by this era a particular version of early Christianity was beginning to emerge as predominant, even as it continued to face competition from different understandings of the Christian faith embodied in contemporary rival communities that were both vibrant and sizable. This emerging “proto-orthodox” version of Christianity professed belief in Jesus of Nazareth as the divine Messiah (Christ), who brought humankind salvation by his incarnation, death, and resurrection, rather than through comprehension of esoteric knowledge or some other means. It was, therefore, primarily Christian leaders and communities belonging to this particular confession of faith that began to forge a union with Roman power and authority.

Nevertheless, even within this emergent and increasingly imperial Christian “orthodoxy,” significant divisions over doctrine persisted, particularly in regard to the “divine” status of Christ. Was he in fact the one God of Abraham, Isaac, and Jacob, Yahweh, the Creator of the universe come among humankind in the flesh or was he instead the manifestation of some other powerful yet subordinate celestial being, as the descriptor “Son” of God the Father certainly could suggest. It was in this context that the early Christians produced their first official and lasting stating statements of faith, or creeds. For much of the fourth century, those Christian leaders and intellectuals who had come into alliance with the Roman Empire debated passionately among themselves regarding the precise nature of the Son of God that had become incarnate in Jesus of Nazareth. Was he in fact identical with Yahweh, the Creator of the universe, or was he instead some powerful heavenly being, who as God’s unique son was, on the one hand, more like God than any other being in existence, but on the other hand, was not the Creator but was himself like all of us also a part of the created order?

After much back and forth, which from a historical vantage could easily have gone in the other direction, the victors in this contest of ideas were empowered to establish their beliefs as authoritative and “orthodox” primarily through a faith statement, the so-called Nicene Creed.¹ This creed was the product of two major international councils of “orthodox” Christian leaders, both of which were organized and funded by the Roman Empire – the Council of Nicea (325) and the Council of Constantinople (381). Since this creed includes doctrinal positions that were established at both councils, the more proper name for this Christian faith statement is the “Nicene-Constantinopolitan Creed.” This creed soon became and remains the foundation of the orthodox Christian faith up until the present, admittedly with some groups continuing to embrace divergent doctrines at various times and places across the subsequent history of Christianity. At its heart are the profession of Christ as a manifestation the Creator Yahweh in the world as a human being, who through incarnation, death, and resurrection brought salvation to the world through the destruction of sin and death. Fundamental to these beliefs was a necessity to find some way of understanding this incarnate God of Abraham, Isaac, and Jacob in a manner that, while remaining true to monotheist belief in one God, could simultaneously identify three

¹ There is, one should note, another well-known early Christian Creed called “the Apostles’ Creed,” and while some scholars have argued that this profession of faith could be as early as the second century, the present consensus favors a dating also in the fourth century. Note also that, despite the name, no historian would ascribe this creed to any of the apostles, either collectively or individually.

distinct “entities” (*hypostases* in Greek) that existed within the one, singular divine being. Thus was born the Christian doctrine of the Trinity, belief a single, unique God who is one in being (*ousia* in Greek) while simultaneous being diverse in three entities (*hypostases*).

On the eve of the second international council in Constantinople, the Roman Emperor Theodosius I in 380 proclaimed the orthodox Christian faith, as defined by the Nicene Creed, as the official faith of the Roman Empire, in anticipation of the council’s predicted outcome. As a result, all other Christian groups with different beliefs lost their legal status, which they had previously enjoyed since Constantine proclaimed religious toleration for all groups in the Empire in 313 with his Edict of Milan. Consequently, Christians who failed to profess this faith statement, the Nicene Creed, were formally condemned as “heretics” and lost their privileges and increasingly faced direct persecution by the Roman authorities. I quote from Theodosius I’s Edict of Thessalonica, which in 380 established a new requirement that citizens of the Roman Empire must profess the Trinitarian faith, soon to be demarcated in the final version Nicene Creed produced at the Council of Constantinople.

According to the apostolic discipline and the evangelic doctrine, we shall believe in the single Deity of the Father, the Son, and the Holy Spirit, under the concept of equal majesty and of the Holy Trinity. We command that those persons who follow this rule shall embrace the name of Catholic Christians. The rest, however, whom We adjudge demented and insane, shall sustain the infamy of heretical dogmas, their meeting places shall not receive the name of churches, and they shall be smitten first by divine vengeance and secondly by the retribution of Our own initiative, which We shall assume in accordance with the divine judgment.²

Within fifty years, this edict became formally ensconced in the tradition of Roman imperial law through inclusion in the *Codex Theodosianus* (438 CE), a compilation overseen by Theodosius II, the grandson of Theodosius I. From this point onward, it was the prerogative and indeed the responsibility of the Roman authorities and their medieval European political successors to police and enforce the doctrinal conformity of individual and/or community professions of faith according to the terms of the Nicene Creed. Indeed, as meticulously codified in this first

² *Codex Theodosianus* XVI.1.2 (Theodor Mommsen and Paul M. Meyer, eds., *Theodosiani libri XVI cum constitutionibus Sirmondianis et leges novellae ad Theodosianum pertinentes* (Berlin: Weidmann, 1905), 833; translation: Clyde Pharr et al., *The Theodosian Code and Novels, and the Sirmondian Constitutions*, Corpus of Roman Law 1, (Princeton: Princeton University Press, 1952), 440).

compendium of Christian Roman law the Roman state (and its successors) held the right and duty to seize the property of those heretics who deviated from the established profession of faith and even to execute them when necessary.³

Henceforth this sort of coerced religious speech became an engrained and accepted part of Christian political and legal culture, particularly in medieval Europe, and Christian faith statements were regularly employed as instruments of political and religious compulsion, persecution, and even violence. From the time of Theodosius I through the High Middle Ages and beyond, political and religious authorities, particularly in the Christian West, held the power to enforce doctrinal conformity. It was their divinely appointed obligation to demand individual and communal profession of officially established doctrines, whose promulgation did not cease with the Councils of Nicea and Constantinople but would continue to proliferate. Yet not until the High Middle Ages do we witness the emergence of what the noted medieval historian R. I. Moore persuasively identifies as “a persecuting society” in western Europe. Since Moore’s scholarship has proven both seminal and field-defining in matters of forced religious conformity and the persecution of confessional deviance in western society since the Middle Ages, for expediency we focus on his work as representative of the *status quaestionis* on these topics.⁴ Moore convincingly charts the transformation of western European political, religious, and legal culture so that “persecution became habitual. That is to say not simply that individuals were subject to violence, but that deliberate and socially sanctioned violence began to be directed, through established governmental, judicial and social institutions, against groups of people defined by general characteristics such as race, religion or way of life; and that membership of such groups in itself came to be regarded as justifying these attacks.”⁵ Yet even in those cases where Moore points toward either a racial or behavioral basis for this concerted persecution, in

³ *Codex Theodosianus* XVI.4.1-XVI.7.3 (Mommsen and Meyer, *Theodosiani libri XVI*, 853-86; trans. Pharr et al., *Theodosian Code*, 449-67)

⁴ The present *status quaestionis*, it should be noted, has thoroughly displaced an older tradition of scholarship, reaching back for centuries, that was overly credulous of certain medieval accounts of these persecutions, which, for reasons that should become more clear, greatly exaggerated the nature, size, and threat of these “heretics” to suit a broader purpose. Accordingly, scholarship on this topic from before the later 20th century must be considered with this fact in mind.

⁵ R. I. Moore, *The Formation of a Persecuting Society: Authority and Deviance in Western Europe, 950-1250*, 2nd ed. (Oxford: Blackwell Publishing, 2007), 4. A presentation of the same ideas aimed at a more general audience can be found in R. I. Moore, *The War on Heresy* (Cambridge: Belknap Press of Harvard University Press, 2012).

each case the foundation is ultimately religious, grounded primarily in religious difference (e.g., Jews) or behavior that transgressed religious ethics (e.g., sodomy).

At the heart of Moore's identification of this emergent persecuting society is his discovery that in fact most of the groups and individuals who were the objects of fierce and concerted religious persecution posed no real threat at all and were in many cases largely non-existent. In this age western civilization morphed into society in which the authority of political and religious leaders was established through manufacture of a conjured internal other, whose presence was both insidious and pernicious, and who had to be eradicated at all costs. So, for instance, the inquisitorial agents of the Catholic Church made fearsome monsters out of the dualist Cathar heretics in the south of France or the "proto-Protestant" Waldensians in order to warrant a fierce and extensive campaign of persecution.

From the middle of the twelfth century onwards the Cathar sects were inflated by commentators and inquisitors into a vast and well-coordinated international organization with a culture, a theology and even a pope of its own. The promulgation of these myths justified and encouraged persecution. But in the last analysis they could be promulgated quite safely precisely because they were not true. The Cathar churches simply did not possess the weight and power, historical, intellectual or organizational, to replace the Catholic church, though they might have inflicted a good deal of damage on it. Neither, in the high middle ages or for a long time to come, did the heresies which were native to Western Europe. Even the Waldensian, the greatest of them, amounted in reality to no more than a few scattered, insubstantial and even unrelated sects which owed most of their apparent coherence of teaching and organization to the preconceptions and writings of the inquisitors themselves.⁶

Increasingly, then, beginning in this age, enforced confession of the orthodox Christian faith was mobilized in order to wage persecution as a means of establishing and expanding state and ecclesiastical authority, even when there was no real threat in place. And as Moore further clarifies, this was no passing phase of the medieval West; sadly, the cultural and political mechanisms of a persecuting society and its persistent need for production of an imagined internal other have become enduring qualities of western civilization. So we find well into the

⁶ See, e.g., Moore, *Formation*, 142-43, also pp. 7-10, 158-62, which is representative of the scholarly consensus on this matter. *Ibid.*, 175-77 provides an excellent survey of other major studies on this point.

modern era, where, even if this persecuting society has often shed its original confessional basis in the wake of the Enlightenment, its inquisitorial habitus remains vital, as witnessed particularly in the atrocities of the mid-twentieth century, to take but one obvious and horrifying example.⁷ Indeed, in a final section added to the second edition of his seminal work, Moore notes, in a survey of reactions to his argument over the twenty years since its original publication, that “My assertion was that in the twelfth and thirteenth centuries – well into the second half of the middle ages as they are commonly defined – Europe became a persecuting society, *and that it has remained one*” has not been challenged or questioned.⁸ The emphasis is in the original, and it is the apparent wholesale acceptance of the italicized conclusion that he highlights in this instance.

To be sure, one must emphasize, what took place in the western High Middle Ages was not the invention of persecution. We have already established that the persecution of religious deviance by the Christian political and religious authorities begins with Christianity’s merger with political authority in the later fourth century, and it would remain continuous throughout the centuries that followed. What Moore’s work helpfully establishes is instead the emergence in western Europe beginning in the twelfth century of “a rhetoric and a set of assumptions and procedures which made persecution both more likely to happen than it would have been otherwise, and when it happened likely to be more severe and sustained for longer.”⁹ In this sense, Moore’s comparison to the distinction between “a slave society” and “a society with slaves” is very helpful. “The latter phrase implies simply the presence of slavery, irrespective of its scale and consequences. There have been many societies with slaves in human history, and in many of them slavery has been of minor importance, except from a purely moral point of view. But a slave society is something else altogether, one in which slavery is an essential feature, in the sense that fundamental necessities depend on it, directly and indirectly, and therefore society and culture as a whole are profoundly and pervasively affected by its presence and indispensability.”¹⁰ Along the same lines, what we witness in the history of western Europe in the twelfth century is the transformation of “a society with persecution” into a “persecuting society,” that is, a society that “*needed* persecution, to the extent of expending much ingenuity and anguish to bring it about, though not necessarily (it is important to insist) with conscious

⁷ Moore, *Formation*, vi-ix, 4-5, 93, 154, 91-96

⁸ Moore, *Formation*, 190.

⁹ Moore, *Formation*, 145

¹⁰ Moore, *Formation*, 147

intent.”¹¹ By comparison, the Islamic world, for instance, had been and remained “a society with persecution” but did not become a “persecuting society,” until relatively only recently (although work remains to be done on elucidating this transformation in certain Islamic societies). Even the Roman Empire, which persisted in the eastern Mediterranean world until 1453, did not similarly develop into a persecuting society along the lines of what we witness in the West.¹²

Therefore, the Christian West historically stands in contrast to most other societies where “persecution may be extremely savage, and is often trumped up for the sake of political advantage of one kind or another, or to increase the power of the centre over local communities. Nevertheless, while particular campaigns sometimes continue for many years, persecution itself is occasional and intermittent. It ebbs and flows.”¹³ This was, for instance, the sort of persecution that the Christians themselves experienced during their early centuries at the hands of the Romans. By contrast, beginning in the High Middle Ages, a new pattern of persecution emerged, with religious confession at its basis, that would seem to be “uniquely European (at least until the twentieth century), a single set of mentalities (including, almost invariably, the demonisation of the accused) and mechanisms (including, almost invariably, inquisition, of which more below) has ensured, first, that in all the great persecutions from the Albigensian crusade to the present day each series of arrests, accusations and trials would itself provide the basis for the next, in an ever-widening circle of denunciations and confessions; and second, that as each particular persecution has run its course there have been others to replace it, so that while the victims have changed persecution itself has proceeded down the centuries, constantly expanding both the number and the variety of its objects.”¹⁴

These mentalities and mechanisms would persist into the religious persecutions of the sixteenth century, when the very real confessional differences afforded by the emergence of new kinds of Christianity provided fodder for intra-Christian violence and persecution, with the Anabaptists in particular suffering gravely at the hands of Protestant and Catholic alike for their confessional deviance. Indeed, one historian of early modern Europe suggests the possibility that the sixteenth century achieved “the zenith of Moore’s persecuting society,” an assessment that,

¹¹ Moore, *Formation*, 148; emphasis in the original.

¹² See the clear articulation of these differences in Moore, *Formation*, 148-52

¹³ Moore, *Formation*, 153.

¹⁴ Moore, *Formation*, 153-54

as Moore himself observes, perhaps underrates the twentieth century in this regard.¹⁵ The European witch craze of the sixteenth and seventeenth century should be understood as extensions of this persecutorial formation, a phenomenon which regrettably followed the European colonists to American shores. No less lamentable is the transatlantic passage of religious persecution of Christians by other Christians on the basis of confessional statements and allegiance. Although we tend to remember many of these settlers as fleeing religious persecution in Europe, in fact many of these same Christians made the journey in hopes of establishing a more persecutorial – and religiously pure – society than the one they left. Religious persecutions, often violent, were sadly an all-too-common feature of certain Christian communities that settled in the lands that would become the United States. This subject will be addressed more directly under topic six.

It is entirely obvious, or at least it should be, that the concerns of many early Enlightenment thinkers for protecting religious freedom and preventing forced profession of faith statements arose in direct response to the formation of a persecuting society that was inherited from the Middle Ages and early modernity. There is, moreover, I would suggest, no more important example of these Enlightenment values regarding the separation of religious profession from political power put into practice than the US Constitution and its Bill of Rights. I realize that now I am treading into territory where I am sure the lawyers of the Attorney General's are far more expert than I, but allow me to bridge the gap by adding my professional opinion to their own. The values enshrined in the US Constitution, with its guarantees of freedom of religious belief and freedom from compelled profession of faith, must be understood as arising directly from the historical context in which the document was written. This was, again at the risk of stating the obvious, an intellectual context, politically and religiously, in which the ideas of John Locke and Thomas Paine (among others) on the rights of individual human beings, especially in regard to freedom of religion and freedom of expression, were paramount.¹⁶ These ideas arose in direct response to the culture of persecution, focused particularly on religious

¹⁵ Moore, *Formation*, 195, citing William E. Monter, "Heresy Executions in Reformation Europe, 1520-1565," in *Tolerance and Intolerance in the European Reformation*, ed. Ole Peter Grell and Robert W. Scribner (New York: Cambridge University Press, 1996), 48

¹⁶ See e.g., John Locke, *A Letter Concerning Toleration* (1689); Thomas Paine, *Common Sense* (1776). If one is looking for context, one should note that *Common Sense* was the most widely circulated and read (often aloud in taverns) book in the Thirteen Colonies on the eve of the American Revolution – with perhaps the exception of the Bible.

confession, that was inherited from the persecuting society formed in the High Middle Ages. Accordingly, the values engrained in the Constitution demand that its original intent, as clearly demarcated by the Enlightenment principles regarding religious freedom that form its basis, be firmly upheld in the face of the abiding and aggressive mechanisms and mentalities of “the persecuting society.” Despite the clear and obvious efforts of this country’s founders to build a bulwark around the public sphere that could restrain these impulses to persecution and power in the name of religious confession, their force remains persistent and often pernicious threat to many of the most fundamental principles of American democracy.

2. What is the religious or spiritual significance of faith statements, creeds, or oaths like those that Crown and Northwestern require, in both Christian and non-Christian traditions? Within the Christian faith traditions, is the significance uniform or varied?

As a general rule, such professions of faith generally mark the boundary between those who are members of a particular religious community and those who are outside of it. One becomes a member of a particular religious community generally through some public profession of the faith held in common by the members of the community. This is particularly so in the case of religious traditions that are “evangelistic,” to borrow a Christian term, and are not ethnically based – in other words, traditions where conversion from outside to inside the religious community is both encouraged and relatively common. In the Islamic tradition, for instance, the process of conversion involves no more than a simple profession of faith – “There is no god but God, and Muhammad is the Messenger of God.” That is it. In light of the present case, one has to wonder how the court, or the plaintiffs for that matter, would regard a situation in which an Islamic college or university in Minnesota were to seek participation in and funding from the PSEO program. Presumably, like any other religiously affiliated institution, it would be welcome to participate. But what if this Islamic college required of any Minnesota public high school students who enrolled in its classes through PSEO that in order to attend they had to agree to sign a formal faith statement professing “There is no god but God, and Muhammad is the Messenger of God”? Such profession, if sincerely made, would in fact make them Muslim on the spot, with, one should note, often very severe penalties (including execution) for subsequent apostasy from Islam. Otherwise, if the profession is not meant to be sincere, in this case or in the case of the similar faith statements mandated by Crown and Northwestern, one certainly has to ask what is

the point then? If an insincere profession is accepted, then why on earth would one require it: it would be utterly meaningless. Yet if a sincere profession is required, then in the analogous situation of an Islamic college that required such a statement of faith, the MDE would be providing funding to an institution that compelled those public school students who participated through PESO to become Muslim. I'm no lawyer, but bald common sense seems to dictate that such a compelled religious speech and conversion would be clearly unconstitutional.

So too in Buddhism conversion is effected by a simple profession of faith, in the presence of a religious authority, in the "Three Jewels": the Buddha, the Dharma (the Buddha's teachings), and the Sangha (the monastic tradition which is the custodian of the Dharma). Lay Buddhist converts often additionally profess the "Five Precepts":

1. To refrain from killing.
2. To refrain from stealing.
3. To refrain from lying.
4. To refrain from being intoxicated.
5. To refrain from improper sexual conduct.

Would it be acceptable to the court, in light of the establishment clause, to send public monies to educational institutions that required such profession of faith in Buddhism, and accordingly, conversion to Buddhism? Even if the penalties for apostasy from Buddhism are generally not nearly so severe as in Islam, one expects that the court would easily find such a compulsory profession of religious faith and conversion unconstitutional. Conversion to the Baha'i faith involves simply signing a card containing a profession of faith: surely the equivalence of this process of conversion to the written assent to a faith statement required by Crown and Western is obvious. Therefore, could the court possibly allow a Baha'i educational institution to require Minnesota public school students to convert to the Baha'i faith in order to take a class paid for by state funds? Again, the answer seems painfully obvious.

In the Christian tradition, for the overwhelming majority of communities conversion is finalized and sealed through the ritual of baptism. Nevertheless, while baptism formally marks the boundary between those inside and outside of the Christian faith, the ritual itself is in fact secondary to a profession of faith. In more traditional forms of Christianity, i.e., Roman Catholic, Eastern Orthodox, Anglican/Episcopalian, Lutheran, Methodist, etc., the process of adult baptism rests on a prior profession of faith and intent to be baptized into the Trinitarian faith with

professed acceptance of salvation through Jesus Christ the Son of God. Indeed, in some traditions, notably Catholic and Orthodox, and extended period of catechesis, instruction in the fundamental beliefs of the faith, it required before one who has not previously received baptism may become baptized. Only once the priest is satisfied that a candidate for baptism fully understands and believes the most important doctrines of the faith is he or she admitted the sacrament and into the community. The ceremony of baptism for an adult generally involves a public profession of faith in the Triune God of Abraham, the Creator of the universe, who accomplished the salvation of the world by becoming a human being in the person Jesus of Nazareth (in other words, the doctrines of the Nicene Creed). In the case of infant baptism, which is practiced in these more traditional communities, the principles of the Nicene Creed are professed by the parents and godparents, as well as the congregation, on behalf of the child, with a promise before God to rear the child in these key principles of the faith.

In less traditionally oriented, i.e., more reformed, forms of Christianity, the relation between profession of faith and baptism is often configured a little differently. In this case we have to do especially with many Christian communities that reject infant baptism and allow only for so-called “believer’s baptism.” Among these Christian faith traditions are the Baptist tradition, the Restorationist tradition, and other more evangelical and fundamentalist forms of Christianity which reject much of historical Christian tradition with the goal of re-forming the Christian faith anew through radical adherence to the principle of “scripture alone,” the great rallying cry of the sixteenth-century reformers. The very phrase “believer’s baptism” alone highlights the priority of a profession of faith in such communities prior to baptism. These communities generally recognize the individual’s profession of faith as the act that actually brings salvation and entry into the Christian community. Only those who have made a clear and sincere profession of faith are admitted to baptism, a tenet that excludes, obviously, the possibility of infant baptism. Accordingly, the physical act of baptism, while important, is understood primarily as an act of obedience or symbolic act that demonstrates the individual’s faith, rather than a powerful sacrament in which the believer is redeemed from sin and death and claimed for Christ (the more traditional view). Both Crown and Northwestern espouse this evangelical faith and the practice of believer’s baptism. Accordingly, one must understand that from the perspective of these educational institutions, any students who are allowed to take courses on their campus, including PESO students, must either affirm that they already are

Christians (according to their mandatory sectarian professions of faith) or they are compelled to convert through professing the required statement of faith. Or they must lie.

One should note, however, that not all Christian educational institutions within this evangelical/fundamentalist tradition share the conviction that all students should be compelled to sign a faith statement in order to enroll and attend classes. For instance, as an example, one can look to the recent decision of Multnomah University in Portland, OR to abandon the practice of requiring faith statements for students enrolled in educational programs that are not oriented specifically toward preparing students for service in the church. While students training for pastoral ministry are, understandably, expected to sign a faith statement, as are all faculty, students who enroll in the university's, accounting, biology, and history programs (etc.), for instance, are as of fall 2023 no longer required to sign a faith statement. This change was adopted unanimously by the school's trustees in a conscious effort, one should note, to align the university more with the values of its Christian faith than had previously been the case. As the university's statement regarding this new policy begins: "This update gives Multnomah University the ability to live out its goal of being a transforming force in the world through Christian education by prioritizing growth, sustainability, and vitality to ensure a vibrant institutional future.... We are a community of restorers and cultivators who have existed within a structure that limits who we educate. As we've grown, we've realized our distinctive lies in how we educate, not in who we admit. Our faculty are best-in-class at biblical integration, and we want to share that education and fervor for Christ with the world." Multnomah's statement further continues to explain the decision to drop this compulsory confession as providing "an opportunity in this pivotal time in higher education to impact the lives of more students with the transforming love of Christ. Multnomah has always functioned as a 'covenant' (closed enrollment) community, which focused on educating only Christian students. The Board of Trustees felt called to become a 'missional' (open enrollment) community, which will educate any student in a Christian context, regardless of a student's faith journey."¹⁷

According to the university's president, Jessica Taylor, the change was a "faith decision" to "expand our mission and our vision to share and spread the gospel." The aim is to enroll students who are "not yet" Christians but may be curious, and by welcoming them into their

¹⁷ <https://www.multnomah.edu/updates-to-multnomah-university-undergraduate-structure-and-enrollment-requirements/>. Accessed 28 March 2024.

faith-centered community to persuade them through their witness, individually and collectively, to become Christians. As Taylor continues to explain, “It’s important as well that as Christians, we learn how to engage across difference and we model for our students how they will be engaging in a world that is not tailored to their theological way of thinking.” Thus, Multnomah’s Christian students will be prepared “to engage in a changing world. And that won’t be so scary because they’ve had experience doing it on our campus.” According to the Council for Christian Colleges and Universities, Multnomah University’s change in policy reflects a broader trend currently underway at Christian colleges and university across the US.¹⁸ Multnomah and these other schools stand as clear evidence that Christian colleges and universities in the evangelical/fundamentalist traditions can indeed operate and thrive without compulsory faith statements. Not only that, but as the trustees and president of Multnomah University clearly acknowledge, doing so brings their institution more into conformity with Christ’s command to his followers in the gospel traditions: “Go therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit and teaching them to obey everything that I have commanded you” (Matthew 28:19-20). Obviously, it is much easier for a Christian institution to fulfill this pivotal command if it welcomes nonbelievers into its community and engages them in learning and conversation rather than excluding them or forcing them to submit to a compulsory statement of faith that they do not believe.

This mounting divide among colleges and universities in the evangelical/fundamentalist Christian tradition with regard to mandatory faith statements is reflective of a longstanding divide within the broader Christian tradition itself, reaching back at least as far as the second century, if not possibly even earlier. Historically Christian communities have tended to adopt one of two alternative postures to “the world,” that is the non-Christian elements of the society in which they live. Already in the middle of the second century the early “church father” Tertullian (160-240), a Christian convert and lawyer from Carthage, forcefully articulated across his many writings a vision of the Christian community as “covenantal” (closed) to borrow the terminology used in the Multnomah University statement. According to Tertullian and Christians across the ages of a similar spirit, in order to remain pure and to protect the truth of the gospel message, Christians must remain starkly separate from the non-Christian world around them. For instance,

¹⁸ <https://www.insidehighered.com/news/institutions/religious-colleges/2023/08/08/multnomah-drops-faith-statement-requirement>. Accessed 28 March 2024.

Tertullian forbade Christians from participating in the government and from sending their children to be educated in public schools: both involved exposure to and compromise with the “pagan” beliefs of the Greco-Roman world. This included, by the way, a proscription of Christians from serving in the military. Christians were not allowed to attend the theatre or sporting events given their non-Christian associations, and Christian women were required to dress modestly, including even wearing a veil when venturing into public. Secular knowledge – the philosophy and science of ancient Greece and Rome – were to be shunned by Christians: engagement with these “pagan,” secular discourses could only damage and distort the message of the gospels, leading Tertullian to proclaim perhaps his most famous phrase: “What then has Athens to do with Jerusalem, the church with the academy?... After Christ Jesus we have no desire for knowledge, nor after the Gospel any need for inquiry.”¹⁹

There is, however, a clear alternative to this view of the Christian faith and its message as inherently fragile and vulnerable in the face of the broader world. In the writings of Tertullian’s slightly older contemporary, Clement of Alexandria (150-215), we find a confident vision of the Christian faith which had been revealed specifically to engage, embrace, and ultimately transform the world. Clement, it seems, had been raised in the Christian faith, and as a young man he travelled throughout the Roman world seeking out the most learned Christian intellectuals to study under. Eventually he settled into Alexandria where, according to tradition, he established a Christian academy, where the Christian faith was interpreted using the most sophisticated intellectual tools of the age, namely Greek and Roman (and especially Greek) philosophy and science. Clement believed that just as divine providence had prepared the world to receive God’s revelation in Christ through the unfolding history of the Israelites and Jews, so too God had through the philosophies of other ancient peoples (and again, the Greeks especially), prepared the way the world’s reception of Christ and his message. Therefore, faith and philosophy, the church and the academy, were not only compatible but were to be understood as working in synergy according to divine plan. Faith, for Clement, was merely the beginning of the Christian life: Christian faith must continue to grow through learning and understanding. Indeed, Clement believed that Christians could and indeed must use the truth found in Greek philosophy

¹⁹ Tertullian of Carthage, *On the Prescription of Heretics* 7 (François Refoulé and Pierre de Labriolle, eds., *Traité de la prescription contre les hérétiques*, Sources chrétiennes 46 (Paris: Éditions du Cerf, 1957), 98-99; my translation).

to bring non-Christians to conversion. Likewise, he saw the Christian life as being in every way compatible with the social mores of the Roman world. The world was to be fully engaged, and the truth of reason and revelation were one truth, as the meticulous and concerted study of both could not fail but disclose. The “world” and all its secular learning were brought to engage with the Christian faith, which ultimately would transform them both according to the divine plan. And so with Clement, we have the foundations of the stance that Multnomah University’s statement identifies as “missional,” that is, open to and engaging the world through Christian faith.

Both perspectives on the Christian faith and its relation to the world have certainly had their advocates across the ages, from both individuals and communities, which is to say that the model embraced by Crown and Northwestern in fencing out the world with mandatory doctrinal statements is certainly one option, but not the only one. Indeed, it was Clement’s view that would come to prevail, for fairly obvious reasons, after that fusion of faith and polity that took place in the Roman Empire’s gradual embrace of Christianity during the fourth century. In the Christian West, perhaps the single greatest advocate of this vision of Christianity as a destined to engage and transform the world was Augustine of Hippo (see e.g., his *City of God*), who is, after Jesus and Paul, the single most influential figure in the western Christian tradition. But especially with the new forms of Christianity that emerged in the sixteenth-century reformations, there was a notable resurgence the Christianity vs. the world model, in which the believers and the faith had to be sequestered in order to survive the corrupting influences of the wicked and fallen society around them. The Anabaptists (the predecessors of the Amish and Mennonites) represent the most extreme version of this, but one should also note some striking similarities in John Calvin’s tyrannical reign in Geneva to the Christian worldview of Tertullian.

Unlike Tertullian, Calvin was quite the intellectual and was deeply inspired in his theological reflection by the Humanist tradition of the Renaissance and its embrace of classical culture and philosophy. Yet when it came to erecting a boundary between the community of Christian believers and the corrupting influences of the world, Calvin was clearly a kindred spirit to Tertullian. Under Calvin’s *Ecclesiastical Ordinances*, he had sole and absolute authority to excommunicate anyone who was seen as a threat to the integrity, doctrinal and moral, of the Christian community. He had a “secret police” that operated through the city seeking out incidents of immorality, which included, among other things, cursing, dancing, “unseemly

singing,” and playing cards. All of these worldly activities were seen as a dire threat to the moral fabric of the Christian community and had to be carefully policed. The world and its values were unwelcome in Calvin’s Geneva, and the authority of both church and state, which were truly one, kept the faith and the faithful carefully protected from the dangerous and threatening influence of the broader world around them. It is worth noting, in anticipation of topic six, that this model of the relationship between church authority and the state, as well as between the Christian faith and non-Christian society, was very popular among many of those European Protestants who settled in the territory of the future United States in the seventeenth and eighteenth centuries.

3. Have faith statements, creeds, or oaths like those that Crown and Northwestern require ever been used for purposes of persecution, marginalization, or abridging the rights of persons of other faiths? If so, when and how?

I believe that this topic has already been largely addressed in consideration of the first topic. From the merger of the Christian faith with political power in the fourth century, faith statements and creeds have been routinely used by Christian states for such purposes. The primary exception to this pattern in the history of western Christian civilization has come in the form of Enlightenment political philosophy, referenced above, which sought to establish a bulwark separating political authority from religious authority, in a conscious effort to disrupt their conjoined persecutorial power.

4. Has compelled participation in faith statements, creeds, or oaths like those that Crown and Northwestern require ever been regarded or perceived as a threat to public safety, public peace, or public order? If so, when and in what ways?

The questions posed are somewhat difficult to answer. But perhaps the most pertinent examples from the history of Christianity would be the persecutorial frenzy that can result once such an “inquisition” into the faith of various individuals and communities takes hold. I return again to R. I. Moore, as presenting both an authoritative and representative view of the formation of the culture of persecution in the Christian West and its consequences. Once the fiction of rampant heresy or a sinister internal “other” has been conjured, suddenly its faithful opponents are quick to find it – and to seek to eradicate it – in every corner. As Moore observes of the persecuting society since its medieval formation, to repeat part of a quotation given above, “in all

the great persecutions from the Albigensian crusade to the present day each series of arrests, accusations and trials would itself provide the basis for the next, in an ever-widening circle of denunciations and confessions.”²⁰ The European and early American witch craze affords a clear example where such inquisitions could be disruptive of public order and peace, although in this case the significance of creeds and faith statements – while not entirely irrelevant – is more marginal. But I suppose that for comparison one might recall the disturbances caused by the “Red Menace” and McCarthyism in the last century. Although the deviant professions of faith in this case also are not strictly religious, their broader social impact can give some perspective from recent memory of just how socially disruptive such inquisitorial prosecutions of (alleged) deviant beliefs can be. This is an inherent danger once a society’s conception of justice shifts, as it did in the High Middle Ages, from “a passive role, mediating conflict between individuals and groups, avenging injuries and resolving disputes which are reported to it and so on,” and embraces instead “an active, institution-building authority which seeks out offences on the assumption that they must have been committed, and which invents crimes, such as blasphemy, fornication or treason, which are offences not against identifiable individuals but against the system of law itself and the authority and values which it claims to uphold.”²¹

5. Compared to secular oaths, such as testimonial oaths in court, do faith statements, creeds, or oaths like those that Crown and Northwestern require demand at least an equivalent level of sincerity of belief by the speaker?

As mentioned briefly above in addressing the second topic, it is hard to see how such compulsory statements of faith make any sense in the absence of genuine sincerity and conviction. One must assume that both Crown and Northwestern, and other similar Christian schools requiring mandatory profession of a faith statement, expect the profession to be sincerely made. There is of course no guarantee that this compelled speech is genuinely given with conviction, as is inherently the case with any compelled speech. Returning again to Multnomah University’s recent decision to desist in requiring non-ministerial students to sign a statement of faith in order to be admitted, the board explains that its decision was made partly in acknowledgment of the reality that many students in the community had in fact signed the faith

²⁰ Moore, *Formation*, 154.

²¹ Moore, *Formation*, 158.

statement without conviction simply in order to avail themselves of the university's educational offerings. By removing this impediment, the trustees envision more honest and productive conversations about faith between the university's Christian believers and those whom they identify as "not yet Christians." One might also note generally on this topic that hypocrisy is among the gravest of sins according to the words of Jesus in the canonical Christian gospels. Surely Christian colleges and universities would not wish to encourage prospective students to commit this deadly sin by swearing falsely to belief in a faith statement. Yet one cannot fail to see how this must often be an inevitable consequence of such compulsory statements.

The issue of sincerity in regard to assent to compulsory faith statements certainly calls to mind the "conversion" of the Jews of the Iberian Peninsula. Under direct and violent pressure from the political and ecclesiastical authorities, many Jews and Muslims who remained after the reconquest of Spain and Portugal during the Middle Ages were forced to convert to Christianity and to publicly profess compulsory statements of faith in order to survive. Beginning in 1492, Jews and Muslims living in Spain were ordered to convert to Christianity or leave the country – or, the only other alternative, face execution. The result was forced, false conversions numbering in the hundreds of thousands, fueled by popular anti-Jewish sentiment that often resulted in riots and pogroms. Yet since very many if not the great majority of these conversions were made under compulsion and therefore not sincere, many Jewish *conversos* or *marranos* continued to observe Judaism privately and in secret. The Spanish and Portuguese Inquisitions were established particularly with the aim of identifying and rooting out those Jews (and Muslims) who had made an insincere conversion and profession of faith under state compulsion. Although these Inquisitions sought out many forms of confessional deviance, their primary purpose was to surveil and monitor those Jews who had converted under compulsion – and their descendants – in order to ferret out those who had converted insincerely and continued to practice Judaism in secret. Those suspected of crypt-Judaism were subject to tortures to bring to light their perfidy and to show trials yielding severe and often unwarranted punishments, including public execution.

To be sure, the compulsory faith statements imposed on Minnesota public school students who wish to take advantage of the PESO opportunities at either Crown or Northwestern are hardly tantamount to the horrifying persecutions and injustice of the Iberian Inquisitions. Yet at the same time, there is seemingly the significant parallel of an agent of the state imposing a

forced confession of faith on citizens. Please forgive my amateur legal imprecision, but it seems to me that once Crown, Northwestern, or any other institution of higher learning accepts money and studies from PESO, it is acting as an agent of the state in part of its mission and service to the citizens of Minnesota to provide free access to the secondary education of the highest quality possible. It is using money from the state coffers for a public purpose, and yet in this capacity it will only agree to serve students who submit to profession of a compulsory faith statement that is not even generically Christian but hews specifically to the distinctive forms of evangelical Protestantism espoused by these communities. That is not to mention the fact that the enforcement of these statements also aims to exclude from state services students who engage in sexual practices that are protected under state and federal law but are condemned by these institutions. And not only that, but they would exclude from these services even those potential students who do not actively condemn and oppose these legal and protected behaviors. But returning to the compulsory statement of faith and the question of sincerity, it seems inevitable that the imposition of such faith statements will have one of two unacceptable consequences. Either the institution will exclude non-Christians from taking advantage of this education resource offered to all Minnesotans equally by the MDE (particularly in the case of Crown, where there is no other institutions providing PESO within a 25-mile radius), or it will result in forced conversions and insincere professions of faith by non-Christian students who have need of the opportunities afforded by PESO and must resort to such measures to obtain them.

Finally, at the risk of becoming preachy, I think it is worth asking these Christian educational institutions just what would Jesus do? Based on the words attributed to him in the New Testament gospels I feel confident in concluding: not this. The Jesus of earliest Christian memory was someone who sought out and preached among the sinners and the lost, and decidedly spurned the sanctimonious and “saved.”

6. How were faith statements, creeds, or oaths like those that Crown and Northwestern require regarded in England and America during the eighteenth century?

It is most helpful to begin addressing this topic in seventeenth century England and America, since many of the patterns in place during the eighteenth century were formed in and derive from the preceding century. A key event in understanding the role of faith statements and their imposition in early European America and contemporary England are certain events of the

English Civil War. Most notably the Puritan Revolution of 1640-53 and the intemperate, despotic, and puritanical reign of Oliver Cromwell as Lord Protector of England for life that followed the execution of King Charles I for his Catholic sympathies. Cromwell seized power with the support of a radical Protestant militia known as the New Model Army (also known as the “Roundheads” for their literal interpretation of 1 Corinthians 11:14) and dissolved Parliament. As a result, it is no surprise that his reign, the Protectorate, as this period of English history is known, resembled very much Calvin’s Geneva as described above. A strict moral regime was imposed across the land – one that was narrow even by traditional Christian standards – which banned all “frivolous” practices (including the theater), mandated the observance of Sunday as a day of rest analogous to the Sabbath, and banned the celebration of Easter and Christmas in Great Britain and Ireland, since these commemorations were an unwarranted popish invention. Adultery was punished by death and fornication with three months’ imprisonment, while Quakers were particularly despised and targeted for persecution, a predilection that the Puritans would bring with them across the Atlantic. Like any good autocrat, Cromwell appointed his son Richard as his successor, but by this time the British had grown discontent with the tyrannical reign of the Cromwells and their moral police state. Richard Cromwell was removed from power and the monarchy was restored under King Charles II, even though he was known to have strong Catholic sympathies, but Catholic sympathies were seen as preferable to the reign of political and religious tyranny that had been endured under the Protectorate. Charles II was then succeeded by his brother James II, who was openly Catholic, but the English, it seems, would not brook the rule of a Catholic dynasty. Accordingly, James II was peacefully deposed, and replaced by the Protestant William of Orange, who had married James II’s Protestant daughter Mary, as the new Protestant king and queen of Great Britain and Ireland.

Turning to the Americas, the English Puritans who would establish the Plymouth Colony in North America left England in the context of the mounting sectarian strife that would eventually erupt in the Puritan Revolution and the Protectorate. There is an abiding myth in American historical memory of these colonists as “Pilgrims,” who made the arduous Atlantic crossing fleeing persecution and with the noble goal of establishing a society based on freedom of religion, such as is enshrined in our Constitution. In reality, however, the motives and convictions of these early settlers could not be more different. These “pilgrims” adhered to a

form of Puritanism known as “Separatism,” a movement defined by the conviction that true Christian communities were voluntary associations defined by a shared profession of faith, rather than state or national churches, such as the Church of England. And so they insisted on existing independently and in separation from the official English church, a position that found their ancestors frequently in conflict with the governing authorities, who did not hesitate to arrest and imprison and even execute the movement’s leaders for sedition. While non-Separatist Puritans enjoyed a measure of toleration beginning with the reign of Elizabeth I, Separatists were seen as disloyal to the throne through their rejection of the royal Church of England and were accordingly persecuted.

Therefore, the forefathers of the “Pilgrims” fled persecution in England at the end of the sixteenth and beginning of the century for the Netherlands, where their strict, Puritan interpretation of Calvinism was more welcome. As their congregation aged and its finances grew short, many members returned to England, and so fearing for the future of their religious community, the leaders of this Puritan sect decided to migrate to the Americas in 1620, in hopes of preserving their religious vision. Yet it was not truly to establish religious freedom that they undertook this journey: rather it was to establish a community that would be governed according to their strictly Puritan understanding of the Christian faith, a community in which dissent from this creed, it turns out, was no less welcome than their own beliefs had been in the England that they left behind. Indeed, a public profession of faith, according to the terms of Separatist Puritanism, was required in order to be included in this community and others belonging to the Separatist movement: members were required to publicly sign these statements of faith. These faith statements included not only doctrinal norms but also sworn adherence to a strict moral code that carefully defined and regulated “normal” sexual behavior, much like the Crown and Northwestern statements. The same was equally true of the many other Puritan settlers who would follow after them, establishing communities especially in the Massachusetts Bay Colony. All of them sought to imitate what they upheld as the ideal model of a Christian society – Calvin’s Geneva. Indeed, they came not with the conviction that there should be no state religion but rather to establish instead their own type of Christianity as their own state religion, even as they, admittedly, laid important foundations for a separation of church and state with the establishment of some elements of secular governance independent from the state churches.

That these Puritan settlers had no intention of establishing sanctuaries for religious freedom is entirely evident from their treatment of other Christians with differing beliefs who came to settle alongside them in the English colonies. Indeed, an intra-Puritan dispute over the requirements for church membership necessitated the early departure of many Puritan settlers from Massachusetts and the establishment of a separate Separatist colony in New Haven (1636). There the Puritans of Connecticut planted a form of Puritanism that would be more tolerant than the zealots of Massachusetts (although hardly religiously neutral). Of course, the most notorious example of confessional persecution in early American involves is the violent persecution of Quakers in the Massachusetts Bay Colony, a practice that these Puritans had brought with them from England. As already noted, Puritan persecution of the Quakers was particularly common during the Puritan Revolution and the Protectorate, at which time the Puritans in America were also active in seeking the destruction and forced expulsion of Quakers in their midst. In England, the Quakers were viciously persecuted by the authorities, more so than the Separatist Puritans of England to be sure. Accordingly, the English Quakers sought religious refuge, like the “Pilgrims” before them, through migration to the British colonies in North America. Arriving in Massachusetts, they found themselves quite unwelcome, and between 1659 and 1661 four Quakers were hanged in Boston for their deviant religious beliefs. Many other more fortunate Quakers merely had to forfeit their ears, which were cut off, while others had their tongue bored through with a hot iron. In the end, direct intervention from King Charles II was needed to bring this anti-Quaker terror to a halt, and eventually it would result in direct English administration of the Massachusetts Bay Colony. By the later seventeenth century, then, it would seem that the England the Puritans had left was more religiously tolerant than the new religious communities that they had established in the Americas.

One of the most important American champions for religious liberty was an English Separatist Puritan named Roger Williams, who initially came to settle in Massachusetts Bay Colony in 1631 only to be driven out shortly after his arrival on account of his deviant religious beliefs regarding conditions for membership in the community. Among his heresies were a concern that too close of an alignment between the church and state would lead inevitably to the corruption of the former, as well as a belief that the land in Massachusetts and indeed all of the Americas rightfully belong to the Native Americans. Upon his expulsion from Massachusetts, Williams established in 1636 a new colony in what would become the state of Rhode Island,

“Providence Plantations,” on land that he purchased from the native peoples. There Williams established a polity that would be the first in the Christian world founded on radical principles of freedom of religion. All religious confessions were to be welcomed and tolerated in Providence Plantations, including even those of the native peoples. In 1638 Williams received believer’s baptism, an anathema to the Puritans of New England who practiced infant baptism and condemned any sort of re-baptism in the strongest terms. With this, Williams became the leader of the first Baptist congregation in the Americas, and the new colony of Rhode Island became a haven for religious dissidents in America, welcoming all faiths, including Quakers, Baptists, and Jews to settle there. Indeed, Williams’ powerful statement on behalf of religious liberty, *The Bloudy Tenent of Persecution for Cause of Conscience* (1644), seems to have first coined the idea of a “wall of separation” between church and state in the American lands.

No less so we should look to the colonies of Pennsylvania and Maryland, rather than Puritan New England, to understand the heritage of the Constitution’s protection of religious liberty and freedom of conscience. In 1632 the English Catholic Lord Baltimore secured the right from the Crown to establish a colony on the territory of what would become the state of Maryland. It was to be a refuge for other English Catholics like himself, who were regularly subject to persecution in England for their refusal to join the official Church of England, with the King as its head. Even before the establishment of Rhode Island, the Province of Maryland was established in 1634 as an oasis of religious tolerance and freedom. And since a purely Catholic colony would have made an easy target for unbridled English anti-Catholic sentiment, it was decided from the start that, like Rhode Island, all kinds of Christians were welcome to settle. Only a generation or two after Williams and Lord Baltimore, a prominent and wealthy English Quaker named William Penn, in the face of mounting persecutions of Quakers in England, successfully obtained a royal charter to establish a colony in the Americas that could serve as a refuge for those Quakers who still remained in England, as well as other religious dissidents from around the Christian world. With Penn’s assistance English Quakers first purchased the territory of New Jersey, but their cause was greatly aided when the King granted Penn personally the territory of Pennsylvania. Penn travelled to his newly acquired land and, like Williams before him, secured purchase of the territory from the natives before beginning its settlement. It was billed as a “Holy Experiment” that, like Rhode Island before it, would be founded on principles of freedom of religion. Not only were Quakers welcomed en masse to Pennsylvania, but so too

were Catholics and Lutherans, Huguenots (French Calvinists), Moravians, Dunkers, Schwenkfelders, and even Jews along with those most reviled and persecuted of Christian dissidents, the Anabaptist Mennonites and Amish.

It is therefore in Rhode Island, Maryland, and Pennsylvania, rather than Massachusetts, that the roots of American religious liberty as demarcated in the First Amendment are to be found. Most of the other early colonies, including Carolina, New York, New Hampshire, and eventually even Virginia eventually embraced principles of religious freedom for their Christian inhabitants, generally with the notable exception of Catholics, who only found welcome in the more tolerant colonies of Rhode Island, Maryland, and Pennsylvania. Over the course of the eighteenth century, direct British rule over these American colonies became more forceful, and with that came a more pronounced role for the official Church of England in the colonies: by the eighteenth century, for instance, Anglican hegemony and anti-Catholic sentiment had completely erased Maryland's unique status as a Catholic refuge. Nevertheless, the religious pluralism and freedom of these early settlements remained largely intact, at least for Christians, (excepting of course Catholics) under English supervision during the eighteenth century, setting the course for America's great and enormously successful experiment with religious liberty that would set an example for the rest of the world to follow. The effect of the First Great Awakening in eighteenth-century American Protestantism served to expand significantly the variety of Protestant communities throughout the Thirteen Colonies, while also bringing focus to experience and piety rather than doctrine as the foundation of Christian faith, both of which contributed to an atmosphere of tolerance, at least for different variations within traditional Protestantism. Nevertheless, if there were any prevailing sentiment about the limits of acceptable religious faith in eighteenth century America, it would be the presence of a powerful and pervasive anti-Catholicism that sought to exclude Catholics from settlement and free exercise of their faith. From the vantage of the eighteenth century, then, the Roman Catholic tradition stands among the prime beneficiaries of the separation of church and state and the guarantee of religious liberty that most interpreters have understood to lie at the basis of the Constitution's establishment clause.

Accordingly, in the religious sphere it was visionaries such as Williams and Penn who laid the groundwork for this new direction, while philosophically and politically it was the influence of John Locke and other early Enlightenment thinkers who advocated compellingly for

religious tolerance and liberty. After them, as is well known, it would be our Founders, Washington, Jefferson, Franklin, Madison, and Monroe who took up the torch of religious freedom and ultimately secured its protection in the First Amendment. And although I am hardly an expert on Constitutional history or interpretation, I would conclude by offering an opinion based on my own plain sense reading of the First Amendment and my expertise in the history of the Christian tradition: it is extremely difficult to for me to envision these founders and early American religious leaders allowing the compulsory profession of a religious faith statement in order to receive any of the benefits of citizenship, such as both Crown and Northwestern aim to require. Otherwise, many citizens who would like to – or need to – take classes at Crown and Northwestern and other similar religious institutions of higher learning as a part of their state provided public secondary education would be denied their free exercise of religion in pursuing the education guaranteed them by the state. Likewise allowance of the requirement to have public school students sign any such statement of faith allows these institutions, acting in this capacity as agents of the state, to establish a particular religious confession as normative for students who seek to exercise a privilege granted to them as citizens of the state of Minnesota.

s/Stephen J. Shoemaker

Stephen J. Shoemaker
Professor and Ira E. Gaston Fellow in Christian Studies
Dept. of Religious Studies
University of Oregon